

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JO ANN HOWARD &)
ASSOCIATES, P.C., *et al.*,)
Plaintiffs,)
vs.) Case No. 4:09CV01252 ERW
J. DOUGLAS CASSITY, *et al.*,)
Defendants.)

MEMORANDUM AND ORDER

This matter comes before the Court on Plaintiffs' Motion to Compel PNC Bank to Produce Insurance Policies and Related Communications [ECF No. 2417]. After conducting an *in camera* review of documents provided by PNC Bank, the Court finds as follows.

The Court will not require disclosure of the communications between PNC Bank and its insurers. As a preliminary matter, nothing contained in the communications is relevant¹ to the claims or defenses in this matter, or more specifically, to the issues raised in post-judgment motions. These communications include the opinions of attorneys and discussions between PNC Bank and its insurers to keep the insurer informed on the details of the lawsuit and to determine coverage under certain policies. This has no bearing on any matter pending before this Court.

See Potomac Elec. Power Co. v. Cal. Union Ins. Co., 136 F.R.D. 1, 3 (D.D.C. 1990) (finding correspondence with insurance company lacks sufficient indicia of relevance); *Gulf Ins. Co. v. Skyline Displays Inc.*, No. 02-CV-3503(DSD/SRN), 2003 U.S. Dist. LEXIS 26511 at 13 (D. Minn. Oct. 20, 2003) (same); *Excelsior College v. Frye*, 233 F.R.D. 583, 586 (S.D. Cal. 2006)

¹ "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action." Fed. R. Evid. 401.

(same). Further, many of the communications are protected by attorney-client privilege or the work-product doctrine.

Missouri has recognized an insurer-insured privilege which falls within the attorney-client privilege. *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 53 (Mo. en banc 1976).² However, it requires an existing insured-insurer relationship, where the insurer is obligated to defend and indemnify the insured and the insured is obligated to report covered incidents to the insurer.

May Dep’t Stores Co. v. Ryan, 699 S.W.2d 134, 136 (Mo. Ct. App. 1985); *see also Barker*, 540 S.W.2d at 53. While the Court believes the policy³ behind the insurer-insured privilege extends to situations such as this where an insured is required to report a covered incident to the insurer, it declines to extend the insurer-insured privilege beyond the boundaries set by the Missouri state courts when it is not necessary to do so.

For those communications protected by attorney-client privilege, generally a party waives attorney-client privilege if communications are shared with a third party. However, there is no waiver “where the third party shares a common interest in the outcome of the litigation and where the communication in question was made in confidence.” *Lipton Realty, Inc. v. St. Louis Housing Authority*, 705 S.W.2d 565, 570 (Mo. Ct. App. 1986).⁴ It is undeniable the communications were made in confidence as both PNC and the insurer signed confidentiality agreements. PNC and its insurer also share a common interest in the outcome of the litigation.

² Federal Rule of Evidence 501 states “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” Missouri laws on privilege govern in this case.

³ There are two justifications for the insurer-insured privilege recognized by Missouri courts. *State ex rel. L.Y. v. Davis*, 723 S.W.2d 74, 75 (Mo. Ct. App. 1986). First, the communication is made to the insurer for the purpose of transmitting it to an attorney for protection of the insured’s interest; thus, it should be protected similar to attorney-client privilege. *Id.* The second justification is the insured can make a full report to the insurer without fear of discovery by an adverse party. *Id.*

⁴ The common interest doctrine is generally applied in cases involving multiple defendants represented by different attorneys who are establishing a common defense strategy. However, the language of the doctrine does not limit it to those specific situations.

An insurer certainly does not wish for an adverse judgment against one if it's insured, even when there is a chance they will not have to provide coverage. The vast majority of the communications between PNC's legal counsel and its insurers are protected. Attached to this order, as Exhibit A, is a list of each communication provided and the Court's determination of whether it is protected by attorney-client privilege.⁵

The Court has reviewed each document submitted and determined all of the documents lack relevance. Additionally, the Court has analyzed if each document is protected by attorney-client privilege, and a large majority of the documents are protected. The Court will not require disclosure of any of these communications. Those determined to be not privileged are not relevant to the matters before the Court.

On the issue of imposition of sanctions, the Court will hear oral argument from the parties on whether sanctions are appropriate and the appropriate amount of sanctions, if any. The Court will hear argument on this issue at the post-judgment motions hearing schedule for August 24-26, 2015.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Compel PNC Bank to Produce Insurance Policies and Related Communications [ECF No. 2417] is **DENIED, in part.**

So Ordered this 12th day of August, 2015.



E. RICHARD WEBBER
SENIOR UNITED STATES DISTRICT JUDGE

⁵ Several of the documents are protected by the work-product doctrine as well. Federal Rule of Civil Procedure 26(b)(3) states "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney . . . insurer, or agent)."

EXHIBIT A

A given communication may not be protected from disclosure for several principal reasons, nine of which the Court has identified:

- (1) the communication concerned only underlying facts, and the communication was not shared in order to solicit legal advice;
- (2) disclosure of the communication to a third party waived its protection;
- (3) no attorney was involved with the communication and the communication did not reflect privileged advice from an attorney;
- (4) any attorney involvement was merely as a passive recipient of the communication;
- (5) the attorney's advice was not legal in nature;
- (6) the communication was not made for the purpose of obtaining the attorney's legal advice;
- (7) the communication was made by an employee to whom the privilege does not extend;
- (8) the communication was not intended to be confidential; and
- (9) the document is attorney work product, but the party seeking production has demonstrated that the communication is discoverable.

Next to each ruling lists a corresponding number to the principle referenced.

Document	Ruling	Reasoning
Letter 10-14-09	Not Privileged	1
Letter 10-26-09	Work Product	
Letter 10-26-09	Work Product	
Letter 10-27-09	Not Privileged	1, 6
Letter 10-27-09	Not Privileged	1, 6
Letter 10-29-09	Not Privileged	1, 6
Letter 10-29-09	Not Privileged	1, 6
Letter 11-11-09	Not Privileged	1, 6
Letter 12-10-09	Not Privileged	1, 6
Letter 12-18-09	Not Privileged	1, 6
Letter 01-05-10	Not Privileged	1, 6
Letter 04-22-10	Privileged	
Letter 01-14-15	Privileged	

Letter 01-22-15	Privileged	
Letter 01-22-15	Privileged	
Letter 01-27-15	Privileged	
Letter 02-10-15	Privileged	
Letter 03-10-15	Privileged	
Letter 03-10-15	Privileged	
Letter 03-17-15	Work Product	
Letter 03-30-15	Privileged	
Letter 07-09-15	Privileged	
OPW 1	Work Product	
OPW 3	Work Product	
OPW 5	Copy of Court's Opinion	
OPW 19	Copy of Court's Opinion	
OPW 49	Work Product	
OPW 51	Copy of Court's Opinion	
OPW 65	Copy of Court's Opinion	
OPW 95	Work Product	
OPW 96	Work Product	
OPW 103	Work Product	
OPW 104	Work Product	
OPW 123	Not Work Product	
OPW 124	Work Product	
OPW 131	Work Product	
OPW 172	Work Product	
OPW 191	Work Product	
OPW 193	Work Product	
OPW 195	Work Product	
OPW 198	Copy of Court's Opinion	
OPW 202	Work Product	
OPW 205	Copy of Court's Opinion	
OPW 226	Work Product	
OPW 229	Work Product	
OPW 233	Work Product	
OPW 236	Work Product	
OPW 239	Work Product	
OPW 243	Work Product	
OPW 245	Work Product	
OPW 250	Work Product	
OPW 256	Work Product	
OPW 262	Work Product	
OPW 264	Work Product	
OPW 266	Work Product	
OPW 271	Work Product	

OPW 272	Work Product	
OPW 274	Work Product	
OPW 276	Work Product	
OPW 278	Work Product	
OPW 281	Work Product	
OPW 284	Work Product	
OPW 287	Work Product	
OPW 290	Work Product	
OPW 292	Work Product	
OPW 295	Work Product	
OPW 298	Work Product	
OPW 301	Work Product	
OPW 305	Work Product	
OPW 308	Work Product	
OPW 312	Work Product	
OPW 317	Work Product	
OPW 320	Work Product	
OPW 324	Work Product	
OPW 327	Work Product	
OPW 329	Work Product	
OPW 331	Work Product	
OPW 334	Work Product	
OPW 336	Work Product	
OPW 338	Work Product	
OPW 341	Work Product	
OPW 344	Work Product	
OPW 354	Work Product	
OPW 356	Work Product	
OPW 359	Work Product	
OPW 369	Work Product	
OPW 373	Work Product	
OPW 375	Work Product	
OPW 387	Work Product	
OPW 390	Work Product	
OPW 393	Work Product	
OPW 396	Work Product	
OPW 397	Work Product	
OPW 438	Work Product	
OPW 439	Work Product	
OPW 440	Work Product	
OPW 442	Work Product	
OPW 444	Copy of Court's Opinion	
OPW 458	Copy of Court's Opinion	

OPW 488	Work Product	
OPW 490	Work Product	
Email 1	Not Privileged	1
Email 3	Privileged	
Email 8	Not Privileged	1
Email 9	Privileged	
Email 11	Not Privileged	1
Email 13	Privileged	
Email 18	Privileged	
Email 21	Privileged	
Email 24	Privileged	
Email 29	Privileged	
Email 30	Not Privileged	1
Email 31	Privileged	
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Email 142	Not Privileged	1
Email 143	Not Privileged	1
Email 144	Not Privileged	1

Email 145	Work Product	
Email 149	Privileged	
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Email 152	Work Product	
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Email 242	Work Product	
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Email 260	Not Privileged	1
Email 261	Not Privileged	1
Email 262	Not Privileged	1
Email 263	Privileged	
Email 264	Privileged	
Email 271	Not Privileged	1
Email 272	Work Product	

Email 286	Work Product	
Email 302	Privileged	
Email 303	Not Privileged	1
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Email 323	Work Product	
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Email 349	Privileged	
Email 354	Privileged	
Email 355	Privileged	
Email 358	Work Product	
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Email 367	Privileged	
Email 376	Privileged	
Email 377	Privileged	
Email 383	Privileged	
Email 384	Privileged	
Email 387	Work Product	
Email 401	Not Privileged	Ins. Policy
Email 489	Privileged	
Email 491	Privileged	
Email 493	Privileged	
Email 494	Work Product	
Email 497	Not Privileged	1
Email 498	Privileged	
Email 500	Privileged	
Email 503	Privileged	
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Email 577	Work Product	
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Email 595	Privileged	
Email 597	Privileged	
Email 599	Privileged	
Email 601	Privileged	
Email 603	Privileged	
Email 605	Privileged	
Email 607	Not Privileged	1
Email 608	Work Product	
Email 610	Work Product	
Email 630	Privileged	
Email 631	Privileged	
Email 633	Privileged	

Email 634	Work Product	
Email 637	Privileged	
Email 641	Privileged	
Email 643	Privileged	
Weav. 1	Privileged	
Weav. 6	Privileged	
Weav. 17	Privileged	
Weav. 19	Privileged	
Weav. 21	Privileged	
Weav. 24	Privileged	
Weav. 25	Privileged	
Weav. 28	Privileged	
Weav. 32	Privileged	
Weav. 36	Privileged	
Weav. 38	Privileged	
Weav. 43	Privileged	
Weav. 49	Privileged	
Weav. 54	Privileged	
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Weav. 104	Privileged	
Weav. 106	Privileged	
Weav. 108	Privileged	
Weav. 111	Privileged	
Weav. 115	Privileged	
Weav. 116	Privileged	
Weav. 118	Privileged	
Weav. 120	Privileged	

Weav. 123	Privileged	
E-Room 1	Privileged	
E-Room 3	Privileged	
E-Room 4	Privileged	
E-Room 5	Privileged	
Fees 1	Privileged	
Fees 2	Privileged	
Fees 3	Privileged	
Conf. Ag. 1	Work Product	
Conf. Ag. 2	Work Product	
Conf. Ag. 3	Work Product	
Conf. Ag. 4	Work Product	
Conf. Ag. 5	Work Product	
Conf. Ag. 6	Work Product	
Conf. Ag. 7	Work Product	
Conf. Ag. 8	Work Product	
Conf. Ag. 9	Work Product	
Conf. Ag. 10	Work Product	
Conf. Ag. 11	Work Product	
Conf. Ag. 12	Work Product	
Conf. Ag. 13	Work Product	